

UNITED STATES DEPARTMENT OF TRANSPORTATION  
FEDERAL AVIATION ADMINISTRATION  
WASHINGTON, DC

**In the Matter of:**

**CONTINENTAL AIRLINES,  
INC.**

FAA Order No. 97-28

Served: September 26, 1997

Docket No. CP94WP0168

**ORDER**

Complainant has filed a Motion for Leave to File Notice of Appeal and Appeal Brief Out of Time.<sup>1</sup> Administrative Law Judge Ronnie A. Yoder issued an order dismissing this matter with prejudice on July 5, 1996,<sup>2</sup> but served it on the former agency attorney, rather than on the agency attorney of record at the time. Complainant argues that because the Order was sent to the wrong FAA office, the agency attorney of record did not know that the Order had been issued, and as a result, he did not file a notice of appeal and appeal brief. Thus, according to Complainant's argument, it had good cause for its failure to file a timely notice of appeal. As explained in this order, Complainant's motion is denied.

The pertinent procedural history of this case is as follows. Complainant filed a complaint against Continental alleging that Continental failed to carry out its

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<sup>1</sup> Complainant served its Motion for Leave to File Notice of Appeal and Appeal Brief Out of Time on July 8, 1997.

<sup>2</sup> A copy of the law judge's order is attached.

FAA-approved security program in violation of 14 C.F.R. § 108.5(a).<sup>3</sup>

Peter W. Evans, Esquire, in the Office of the Assistant Chief Counsel for the Western-Pacific Region in Los Angeles, California, was the agency attorney handling this matter.

Subsequently, Complainant submitted a Motion for Protection of Security Information. Complainant noted generally the types of sensitive information contained in the pleadings and other documents and requested that this information be removed from the public record and precluded from public disclosure. Complainant requested that testimony containing sensitive security information by taken in executive session. Complainant also requested that the entire record be sealed "because the protected security information is so intertwined with virtually every pleading and other documents in this case."<sup>4</sup>

By Order dated November 2, 1995, the law judge denied Complainant's Motion for Protection of Security Information, but granted Complainant leave to renew the motion. The law judge explained that he was denying the motion because

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<sup>3</sup> Section 108.5(a) of the Federal Aviation Regulations (FAR) provides in pertinent part as follows:

Each certificate holder shall adopt and carry out a security program that meets the requirements of § 108.7(a) for each of the following scheduled or public charter passenger operations:

- (1) Each operation with an airplane having a passenger seating configuration of more than 60 seats.

Complainant sought a \$10,000 civil penalty for this alleged violation.

<sup>4</sup> FAA's Motion for Protection of Security Information at 4, dated July 26, 1995. Complainant proposed certain procedures to provide protected security information contained in the record only to persons with a need to know, and explained that should a non-party (without a need to know) request information from the record, FAA counsel would redact the document as necessary to prevent release of protected security information. *Id.*, at 4-5.

"Complainant has failed to submit or identify the portions of Respondent's security program requiring protection or the testimony of particular witnesses to be held in executive session." Order dated November 2, 1995, at 6. The judge explained further that Complainant had not made a specific showing, with regard to those documents already filed in this case "that continued public access to the identities of the airport and carrier, the provision of the safety program allegedly violated or the location of the violation is a threat to aviation safety requiring the preclusion of such information from public disclosure."<sup>5</sup> As a result, the law judge denied Complainant's motion to withhold that information from [the] public docket.

On May 16, 1996, the Assistant Chief Counsel for the FAA's Southwest Region submitted a Notice of Substitution of Agency Attorney. As explained in the Notice, Eric E. Anderson, Esquire, in the Office of the Assistant Chief Counsel for the Southwest Region in Fort Worth, Texas, was replacing Mr. Evans from the Office of the Assistant Chief Counsel for the Western-Pacific Region in Los Angeles, California, as the attorney of record in this matter.

During a telephone conference held on June 24, 1996, Mr. Anderson, the new agency attorney, renewed Complainant's Motion for Protection of Security Information. The law judge denied the request again during the telephone conference, noting that Complainant would have the opportunity to renew its request for protection at the hearing at which time the law judge would consider whether Complainant had demonstrated a need to protect each item of information. Complainant then announced that it would not be going forward with the case, and

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<sup>5</sup> Order dated November 2, 1995, at 8.

the law judge in turn advised agency counsel that Complainant would be in default. Later that day, Complainant filed its written Notice of Intent Not to Proceed.

On July 5, 1996, the law judge issued an order dismissing this matter with prejudice based upon his finding that Complainant was in default.<sup>6</sup> According to the service list, a copy of this order was served on the former agency counsel, Peter Evans, rather than to the current agency counsel of record, Eric Anderson.

One year later, Mr. Anderson filed a motion to file Complainant's notice of appeal and appeal brief out of time. As explained in the supporting affidavit signed by Mr. Anderson, he was unaware of the law judge's order of dismissal dated July 5, 1996, because it was not served on his office. He claims that he only became aware of the law judge's order when he read a footnote in a decision in another case<sup>7</sup> referencing the order of dismissal in this matter. Mr. Anderson asserts further that he had checked with the Deputy Assistant Chief Counsel for the Western-Pacific Region who informed him that a copy of the law judge's order was not in the "dummy file" that that office had maintained on this case after it was transferred to the Southwest Region, and that no one in the office recalls receiving that order. Finally, Mr. Anderson asserts that his office had been waiting for the law judge's order because Complainant had intended to appeal from the order. This case, he argues, "was seen as a good case with which to establish the parameters and procedures for protecting sensitive security information that might be disclosed during legal enforcement proceedings relating to alleged violations of the FAA

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<sup>6</sup> See footnote 2.

<sup>7</sup> It is claimed that this decision containing the enlightening footnote was received in the Office of the Assistant Chief Counsel for the Southwest Region on June 30, 1997.

security regulations and particularly relating to violations of provisions of the Airport Security regulations, 14 C.F.R. Part 107, and the Airplane Operator Security regulations, Part 108.”<sup>8</sup> Motion for Leave to File Notice of Appeal and Appeal Brief Out of Time, dated July 8, 1997, at 4-5.

Continental has filed an opposition to Complainant’s motion for leave to file a late notice of appeal and appeal brief. Continental notes that there is no procedural rule permitting such a motion seeking permission to file a notice of appeal out of time. Continental also argues that while service of the law judge’s order on Mr. Evans might have justified some delay of a few days or a week until Mr. Evans could communicate with Mr. Anderson, it does not justify a request one year later to file a late notice of appeal. Continental argues further that Complainant must have expected the law judge to dismiss the case because Complainant had filed the notice of its intent not to proceed.

It has been held that a late-filed notice of appeal will be accepted where good cause for the late filing is shown. *E.g., In the Matter of Metz*, FAA Order No. 90-3 (January 29, 1990). In this case, the inadvertent error by the law judge’s office in addressing the envelope constitutes good cause for Complainant’s failure to file its request for permission to file a late notice of appeal and appeal brief in a timely fashion. However, not filing a timely notice of appeal and filing *one year* out of time are not the same thing. While the primary cause of this situation is unquestionably the error on the part of the law judge’s staff, responsibility must be borne by

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<sup>8</sup> Mr. Anderson asserted that this case was discussed frequently in his office because “there are over fifty air carrier security cases awaiting a hearing before the same ALJ who issued the July 5, 1996 order and involve the same sensitive security disclosure issues as led the FAA to elect not to proceed in this case.” Motion for Leave to File Notice of Appeal and Appeal Brief Out of Time, dated July 8, 1997, at 5.

Complainant for its own failures. On the one hand, the Office of the Assistant Chief Counsel for the Western-Pacific Region failed to forward the order dismissing the case to Mr. Anderson, even though it knew that Mr. Anderson's office was now handling the case.<sup>9</sup> On the other hand, Mr. Anderson, knowing that the law judge had intended to dismiss the case, had a responsibility to inquire as to the status of the case at some point long before a year had passed, especially if Complainant had intended to appeal to the Administrator.

Moreover, even if it was determined that Complainant had demonstrated good cause for requesting leave to file its notice of appeal at this late date, a troublesome question would have remained: could the Administrator have reviewed the law judge's denial of Complainant's motion for the protection of sensitive security information? The law judge dismissed the case based upon Complainant's announcement that it did not intend to go forward with the case. Would the Administrator at this juncture have the authority to review the law judge's underlying rulings regarding the denial of the request for a protective order? If Complainant wanted to appeal from the law judge's denial of the request for protective order to the Administrator, it would have been necessary for Complainant to file a request for an interlocutory appeal for cause under 14 C.F.R. § 13.219(b).

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<sup>9</sup> Complainant does not contend that the law judge's order dismissing the case was not received in the Office of the Assistant Chief Counsel for the Western-Pacific Region. It has simply stated that no one recalls receiving it, and that if it was received, it did not get placed in the "dummy file." Moreover, the fact that the Office of the Assistant Chief Counsel for the Western-Pacific Region maintained a "dummy file" on this case is itself suggestive that the case was not forgotten in that office.

Consequently, Complainant's motion for leave to file a notice of appeal and appeal brief out of time is denied.

JANE GARVEY, ADMINISTRATOR  
Federal Aviation Administration

  
VICKI S. LEEMON<sup>10</sup>  
Manager, Adjudication Branch

Issued this 26<sup>th</sup> day of September, 1997.

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<sup>10</sup> Issued under authority delegated to the Chief Counsel and the Assistant Chief Counsel for Litigation by Memorandum dated October 27, 1992, under 49 U.S.C. § 322(b) and 14 C.F.R. § 13.202 (see 57 Fed. Reg. 58,280 (1992)) and redelegated by the Assistant Chief Counsel for Litigation to the Manager, Adjudication Branch, by Memorandum dated August 6, 1993.